

Exhibit 7

*State of California ex. rel. Ven-A-Care of the Florida Keys, Inc. v.
Abbott Laboratories, Inc., et al.*

Exhibit to the Declaration of Nicholas N. Paul in Support of Plaintiffs' Motion for Summary
Judgment as to Defendant Dey

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Clerk of the Napa Superior Court
 By: 
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 Dey, L.P.

**SUPERIOR COURT OF THE STATE OF CALIFORNIA
 IN AND FOR THE COUNTY OF NAPA**

26-21019

Case No. _____

DEY, L.P., a Delaware Limited Partnership,
 Plaintiff,

vs.

FIRST DATABANK, INC., a Missouri
 corporation, d/b/a/ First DataBank and d/b/a
 PriceAlert; and
 WOLTERS KLUWER HEALTH, INC., a
 Delaware corporation, d/b/a Medi-Span and
 d/b/a Facts and Comparisons,
 Defendants.

**DECLARATION OF RUSSELL
 JOHNSTON IN SUPPORT OF
 PLAINTIFF'S EX PARTE APPLICATION
 FOR A TEMPORARY RESTRAINING
 ORDER AND ORDER TO SHOW CAUSE
 RE PRELIMINARY INJUNCTION**

**Date: April 15, 2003
 Time: 3:00 p.m
 Dept.: B**

**Complaint Filed: _____, 2003
 Trial Date: N/A**

I, Russell Johnston, declare under penalty of perjury under the laws of the State of
 California as follows:

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ORIGINAL

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2 1. I am the Manager of Sales/Marketing Services at Dey, L.P. ("Dey"), the plaintiff
3 in the above-referenced action. As to the following facts, I know them to be true of my own
4 knowledge and, if required, could competently testify thereto. As to those matters stated on
5 information and belief, I believe them to be true.

6 2. I have been employed, in various capacities, with Dey for 11 years.

7 3. Dey is a manufacturer and distributor of pharmaceutical products including
8 several lines of generic (or "multi-source") pharmaceuticals. Dey's line of respiratory drug
9 products includes inhalation therapies such as Albuterol Sulfate, Cromolyn Sodium and
10 Ipratropium Bromide, which are used for the treatment of asthma and other chronic respiratory
11 ailments.

12 4. When a branded (or "innovator") drug comes off statutory exclusivity, one or
13 more generic manufacturers can enter the market. Generic pharmaceuticals are compositions
14 that are identical or bioequivalent to branded drugs. The generic pharmaceutical market is
15 highly competitive.

16 5. Dey has been innovative in this field even while dispensing products that are
17 therapeutically identical to their competitors. In particular, Dey has developed certain value
18 added features in the packaging of its products that enhance the benefits to dispensers of the
19 products, patients and doctors who prescribe Dey's products.

20 6. For example, Dey has provided unit dose formulation of certain products so that
21 the medication is pre-measured and can be administered in a single dose. This makes the actual
22 use of the drug more convenient for the patient, and minimizes wastage. Clearer labeling and
23 packaging have been implemented by Dey to reduce dispensing errors. These supplemental
24 benefits of Dey products, along with competitive pricing, have helped Dey become a
25 manufacturer of choice for many providers of these generic drugs.

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2 7. These attributes contribute to the clinical efficacy and ease of use of Dey's
3 generic pharmaceuticals. These advantages have also helped to make Dey a leader in this market
4 despite the range of alternative suppliers.

5 8. The greater part of Dey's sales are to wholesalers, chain and independent retail
6 pharmacies, hospitals, long term care facilities and managed care organizations. The distribution
7 market is comprised predominately of national full line wholesalers and regional distributors
8 who purchase multiple products or product lines from generic manufacturers. Similarly, many
9 independent pharmacies, hospitals and long term care facilities affiliate with large national
10 buying groups (or group purchasing organizations) in order to increase purchasing power in
11 order to obtain pharmaceuticals for the lowest possible price. Thus, these national buying groups
12 influence the purchasing decisions of a large segment of the generic marketplace.

13 9. The vast majority of patients who benefit from Dey pharmaceuticals receive some
14 form of prescription drug coverage from private insurers or governmental programs such as
15 Medicaid. These third party payors generally reimburse the cost of prescription drugs directly to
16 providers, such as doctors and pharmacists.

17 10. The majority of these third party payor programs for decades have calculated their
18 reimbursements using a bench-mark pricing figure (or reference price) reported as average
19 wholesale price, or "AWP."

20 11. AWP is recognized throughout the industry, and in legislative history and
21 regulatory interpretations, as a "sticker" price.

22 12. The AWP for Dey's products is reported to the pharmacies that purchase Dey's
23 products, private insurers, government authorities and others by First DataBank and Medi-Span,
24 whose business it is to sell access to AWP data for all pharmaceutical manufacturers.

25 13. Private insurance companies reimburse providers for generic products at rates that
26 can discount as much as 50-60% from AWP.

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2 14. When a generic drug first enters the market, the manufacturer will generally
3 suggest an AWP price that is at least 10% below the AWP for the brand name drug in order to be
4 designated by First DataBank as a generic rather than a branded drug.

5 15. Because of the prominence of AWP in the reimbursement formulas throughout
6 the country, a disproportionately low AWP will jeopardize the sales of a generic manufacturer's
7 product because that manufacturer's products will be reimbursed at a lower rate than
8 competitors' products that have a higher AWP.

9 16. It is common within the industry that the reported AWP for a generic drug, once
10 set, will tend to remain constant and not change during the life of the product (with the exception
11 of inadvertent errors on the part of First DataBank). Discounts applied to AWP by third party
12 payors, however, often change over time due to changing market conditions. This has been the
13 case through the years that I have worked in the pharmaceutical industry.

14 17. Because the AWP for a generic drug is almost uniformly lower than that of the
15 branded product, the availability of generics saves money for state Medicaid programs, the
16 federal government and other third party payors.

17 First DataBank and Medi-Span

18 18. Public and private third party payor programs typically obtain AWP figures by
19 purchasing the information from price reporting services such as First DataBank and Medi-Span.
20 First DataBank is the most widely used electronic reporting service.

21 19. In order to ensure reimbursement by third party payors, Dey has reported both its
22 AWP and wholesale acquisition cost ("WAC") to First DataBank since the early 1990's. WAC
23 is the published invoice price to the wholesale class of trade that is used by a few states and
24 insurers as an alternative basis for reimbursement.

25 20. While Dey periodically reduces the WAC as the market prices on its generic
26 products decline, Dey characteristically only reports an AWP figure at launch of the product.
27

1 Historically, Dey has informed price reporting services of its suggested AWP for each new
2 product.

3
4 21. Historically, Dey determines its suggested AWP's before launch of a product, see
5 e.g. Exhibits A and B, and these suggested AWP's have been selected to be reported as the
6 published AWP's by each of the reporting services, including First DataBank.

7 22. Historically, Dey has reduced its WAC prices on their generic drugs from time to
8 time. Since the early 1990's, Dey has reported declines in its reported WAC to First DataBank
9 and despite the fact that Dey typically reduces the WAC prices in their products, the AWP as
10 reported by First DataBank and Medi-Span has typically remained constant throughout the life of
11 the product.

12 23. To the best of my knowledge, never before last week has First DataBank or Medi-
13 Span unilaterally altered Dey's AWP's based upon a change in Dey's reported WAC pricing.

14 24. As recently as February 2002, Dey has lowered its WAC for Albuterol Sulfate,
15 Cromolyn Sodium and Ipratropium Bromide, transmitted such information to First DataBank and
16 the AWP for those products remained unchanged. A copy of this transmission is attached as
17 Exhibit C.

18 The Events of April, 2003

19 25. March 26, 2003, as in the past, Dey reported to First DataBank a decrease in its
20 WAC prices on its Albuterol Sulfate, Ipratropium Bromide and Cromolyn Sodium inhalation
21 products. As with prior WAC price decreases, Dey issued a letter to price reporting services,
22 including First DataBank, informing them of the change. See Exhibit D. This letter is in the
23 standard type form by which Dey has reported price changes to price reporting services for the
24 past decade. See, e.g. Exhibits E, F, G and H.

25 26. Dey did not notify First DataBank or Medi-Span on April 1, 2003 or any time
26 thereafter of any suggested change in its AWP.

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2 27. On April 10, I received a voice mail message from Steve Strom, Manager of
3 Marketing Services, forwarding a voice mail message he had received from a pharmacist
4 working at a Medicine Shoppe pharmacy in Texas. The pharmacist stated that he believed First
5 DataBank had "bad information" and that his pharmacy was "not getting reimbursed properly"
6 for Dey's albuterol products. A true and accurate transcription of this voice mail message is
7 attached hereto as Exhibit I.

8 28. Medicine Shoppe is a large national retail pharmacy chain.

9 29. I phoned the Medicine Shoppe and informed the pharmacist that I was not aware
10 of any changes to Dey's AWP price, and assured him that I would look into the matter.

11 30. Shortly thereafter I received a voice mail message from Hema Chandranatha, a
12 Senior Contract Analyst from Dey whom I supervise. Ms. Chandranatha informed me that she
13 had phoned First DataBank to inquire about the AWP reported for Dey's products because of
14 numerous customer inquiries regarding an apparent change. She reported that First DataBank
15 had informed her that they had implemented a change in the methodology that they were using to
16 calculate AWP prices reported for Dey's products

17 31. Based on Ms. Chanadranatha's conversation with First DataBank, she informed
18 me that First DataBank now sets Dey's reported AWP by applying a 125% markup to the WAC
19 price reported by manufacturers and reportedly were only putting this new calculation into effect
20 when a manufacturer submitted a change in its WAC for a drug. Thus, although they claimed
21 that this methodology had been in place since September of 2002, First DataBank had not
22 applied it to any Dey products until Dey reported a decline in its WAC price in late March of
23 2003. Further, First DataBank never informed Dey that it would be implementing this new
24 methodology. My conversation with Ms. Chanadranatha was the first I had heard of a change in
25 First DataBank's methodology.

26 32. I have also viewed a fax sent to Dey on April 10th from Kinney Drugs, a regional
27 chain pharmacy. Attached to this fax was a printout from Medi-Span's database that reflected a

1 dramatic decrease to Dey's AWP pricing which was identical to the prices reported by First
2 DataBank. A true and correct copy of the fax and attachment, are attached hereto as Exhibit J.

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4 33. Most recently, on April 10, 2003, I received a voicemail message from Mark
5 Boudreau, the Areas Sales Manager in the trade area, indicating that a Dey salesperson had
6 received a message from an employee of American Respiratory Services ("ARS") voicing their
7 concern about the recent decrease in published AWP for Dey's products and the resulting effects
8 on their reimbursement rate.

9 34. Upon information and belief, Dey's most significant competitors have apparently
10 not reported new WAC prices for their drugs since First DataBank adopted its new policy in
11 September of 2002. Upon information and belief based on reports received from pharmacies that
12 purchase Dey's products, neither First DataBank nor Medi-Span have reduced the reported
13 AWP's for any products of any of Dey's competitors. See Exhibit K.

14 Impact of First DataBank's Pricing Changes

15 35. As stated above, the generic pharmaceutical market is highly competitive and
16 there are often many generic versions of any given drug on the market.

17 36. Since third party reimbursement now accounts for approximately 85 % of the total
18 payments made for pharmaceuticals nationally, as a result of the reporting of a low AWP by First
19 DataBank and Medi-Span, pharmacies will simply refuse to buy Dey's products because they
20 cannot be adequately reimbursed for Dey's products as compared to Dey's competitors'
21 products.

22 37. In fact, Medi-Rx, a customer of Dey, has already expressly stated that, because of
23 the low reimbursement rate resulting from the new low AWP reported by First DataBank and
24 Medi-Span for Dey's products, it will no longer purchase Dey pharmaceuticals. Medi-Rx has
25 stated that instead it will purchase from Dey's competitors who have not been subject to a
26 decrease in their First DataBank AWP prices.

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2 38. In the few business days that have elapsed since First DataBank abruptly (and
3 without notice) changed Dey's AWP's, at least 9 of Dey's customers have complained that
4 because of the low AWP reported by First Data Bank, they are not receiving adequate
5 reimbursement for Dey's products. A number of these customers have also threatened to switch
6 their entire purchase of pharmaceuticals to Dey's competitors.

7 39. Since the pharmacies that purchase Dey's products tend to purchase entire
8 product lines from a manufacturer, the effects of First DataBank's actions which discourage the
9 purchase Dey's Albuterol Sulfate, Cromolyn Sodium and Ipratropium Bromide are likely to
10 significantly impact sales for Dey's entire product line of generic pharmaceuticals.

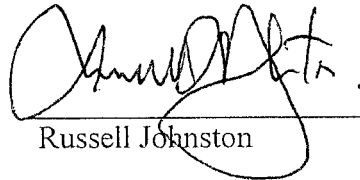
11 40. The growth of group purchasing organizations and pharmaceutical benefits
12 managers have significantly increased the intensity of competition in the generic industry. Many
13 such programs enter into agreements with a particular manufacturer whereby that manufacturer's
14 products are subject to pricing concessions and given a preferred status on the organization's
15 drug formulary. If the members of these collectives cannot receive adequate compensation for
16 dispensing Dey pharmaceuticals, there is little doubt that they will drop Dey's preferred status,
17 thereby significantly decreasing the sale of Dey products.

18 41. Moreover, it is likely that pharmacies and other customers in Napa County will
19 also refuse to buy Dey products should First DataBank continue to report AWP prices for Dey's
20 products that are substantially lower than AWP's reported by First DataBank for its competitors'
21 products. Attached hereto as Exhibit L is a true and correct list of indirect sales to Dey's
22 customers in Napa county.

23 42. Pharmacies that purchase generic products tend to be loyal to a particular
24 manufacturer over time unless something occurs to disrupt the relationship. Thus, the customers
25 that Dey will now lose because of the lowering of AWP by First DataBank will likely remain
26 customers of Dey's competitors for years to come.

1 I declare under penalty of perjury under the laws of the State of California that the
2 foregoing is true and correct and that this declaration was executed this 14 day of April, 2003 at
3 Napa, California.
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